United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7336

To be argued by
SANFORD M. LITVACK

United States Court of Appeals
For the Second Circuit

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P/5

Docket No. 76-7336

JACOBSON & COMPANY, INC.,
Plaintiff-Appellee,

against

ARMSTRONG CORK COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF FOR APPELLANT ARMSTRONG CORK COMPANY

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REPLY BRIEF FOR APPELLANT ARMSTRONG CORK COMPANY

This reply is submitted on behalf of Defendant-Appellant Armstrong Cork Company ("Armstrong") in order to respond briefly to the major factual and legal shortcomings in the arguments set forth by Plaintiff-Appellee Jacobson & Company, Inc. ("Jacobson") in its brief.

I

Jacobson's arguments are based upon erroneous factual premises.

Perhaps recognizing that the absence of a factual basis to support the preliminary injunction entered below is fatal to its position, plaintiff imagines the facts as it wishes they were, rather than as they appear in the record. Since this conjuring of facts is a crucial underpinning to plaintiff's appellate effort, it is appropriate to note a few examples by comparing the facts in the record with the current arguments.

1. Fact

In the fifteen months before its termination by Armstrong, Jacobson did not close a single contracting job in New Jersey and closed only one job in New York, the Texaco Building in Purchase, New York (Def. Brief 7n; A 360; Wiley Dep. 26-27).*

Jacobson's Response

Plaintiff's retort is simply to brand the fact as "blatantly false" (Pl. Brief 23 n.11). Yet, plaintiff fails to cite any evidence in the record that identifies any additional jobs that Jacobson did close in New York or New Jersey during the time period. And, the plain fact is that there was none.

Because Jacobson's failure to obtain new business in New York and New Jersey is significant both in terms of

* Plaintiff-Appellee's Brief and Defendant-Appellant's Brief are sometimes referred to respectively as "Pl. Brief" and "Def. Brief", followed by the reference to a specific page.

assessing whether plaintiff sustained any irreparable injury as a result of the termination and also with regard to the *bona fides* of the cancellation, Jacobson has tried to cloud the issue by arguing that its purchases from Armstrong during 1976 will amount to $475,000 (Pl. Brief 23). This, however, is a transparent irrelevancy, for even assuming *arguendo* the accuracy of that projection, Jacobson's 1976 purchases are of no moment because: (1) there normally is a hiatus of two, and sometimes as many as four, years between a contract award and the consequent purchases (A 303-04; Snyder Dep. 126; Def. Brief 6n), and therefore, 1976 purchases represent jobs closed several years ago; and (2) there never was any issue about Armstrong's willingness to provide materials for jobs committed by Jacobson prior to its termination.

In sum, despite plaintiff's attempt to hide its accelerating decline behind its performance in past years, it cannot refute the fact that, save for one job, it has obtained no new contract business in New York and New Jersey since the beginning of 1975.

2. Fact

Armstrong does not account for more than a small percentage of Jacobson's revenues (Def. Brief 9; A 26, 38).

Jacobson's Response

Jacobson asserts (Pl. Brief 11 n.5) that "[t]here is no basis for this claim, which is contrary to the evidence in the record that Jacobson is dependent upon Armstrong products for as much as one-half of its total revenues (A 40)". Yet, Armstrong's "claim" is taken from the very

figures set forth in the affidavit of plaintiff's president submitted in support of the motion for a preliminary injunction, and it is hard to understand how plaintiff can disown those facts at this late date.

In paragraph 4 of his affidavit Mr. Jacobson attested that in each of the past several years plaintiff's revenues from completed jobs exceeded $12 million (A 26). In paragraph 33 of the same affidavit, plaintiff's purchases of Armstrong ceiling products in 1974 and 1975 are set forth as $860,764 and $605,000, respectively (A 33).* Thus, it seems rather clear that Armstrong accounts for a relatively small portion of plaintiff's business and certainly nowhere near the one-half plaintiff claims.

Nonetheless, despite the foregoing, plaintiff in its zeal argues Armstrong is vital to its life-blood. But plaintiff never reconciles or even attempts to reconcile the contradiction between the facts and its argument. Claims of dire consequences if a dealer is terminated are, of course, commonplace upon preliminary injunction motions, but those assertions must be supported by facts, not merely, as here, by rhetoric.

3. Fact

While Armstrong refused, as was its right, to appoint Jacobson an Armstrong contractor in the Philadelphia area, it never prevented Jacobson from selling Armstrong products in Philadelphia or elsewhere (A 296, 408-09, 449-50).

* As previously noted, Jacobson argues that its Armstrong purchases for 1976 will be $475,000 (Pl. Brief 23). Hence, even assuming the accuracy of that projection, which Armstrong contends is inflated (A 303), there has been a clear, continuing decline in Jacobson's purchases of Armstrong materials.

Jacobson's Response

Plaintiff confuses the fact that Armstrong did not appoint Jacobson a contractor for the Philadelphia market with the charge that defendant prevented plaintiff from selling in the area. The two are, of course, quite different.

There is no question but that Armstrong declined to appoint Jacobson a contractor for Philadelphia in 1968 (A 296, 408-09, 449-50; Def. Brief 4). That, however, is not the issue, and it is neither helpful nor candid to cite letters which declare that Armstrong did not wish to appoint plaintiff a Philadelphia contractor (because Armstrong was satisfied with its existing representation in Philadelphia) to support a claim that defendant prevented plaintiff from selling outside the New York area (Pl. Brief 4-7). Such a quantum leap simply cannot be made. The facts are that: Jacobson and all Armstrong contractors can sell wherever they choose (A 296); Jacobson frequently sold in Philadelphia (A 409-10, 419-20); Armstrong never prevented such sales (A 296-97, 409-10); and indeed, Armstrong frequently provided Jacobson with off-list prices and never refused technical and other servicing assistance in connection with its sales in Philadelphia (A 419-20, 408).*

The foregoing are merely a few examples of plaintiff's substantial departures from the factual record. This attempt to rewrite the facts upon appeal, so as to squeeze this case into a legal niche it does not fit, should be rejected.

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* While trying to tar Armstrong with restraints it never imposed, Jacobson is forced to admit that its activities in Philadelphia in the early 1970's had no nexus with its termination in 1976 (A 543).

II

Jacobson's legal arguments only serve to highlight the error below.

A. Jacobson virtually concedes that the District Court erred in its application of the standards governing the issuance of preliminary injunctions.

In Point I of its brief, Armstrong offered, among others, three distinct fundamental reasons compelling the conclusion that the District Court erred as a matter of law in granting the preliminary injunction in this case:

> First, because the preliminary injunction sought was mandatory, rather than prohibitory, the application was governed by the rule announced in *Clune* v. *Publishers' Association,* 214 F.Supp. 520, 531 (S.D.N.Y.), *aff'd on the opinion below,* 314 F.2d 343 (2d Cir. 1963), rather than the less stringent standards announced in *Sonesta International Hotels* v. *Wellington Associates,* 483 F.2d 247, 250 (2d Cir. 1973), which the District Court applied;
>
> Second, even if the *Sonesta* test were controlling, as the District Court thought, the preliminary injunction was wrongly issued because the trial judge explicitly declined to conclude that Jacobson had shown any likelihood that it would prevail on the merits at trial; and
>
> Third, viewed most favorably to plaintiff, there were irreconcilable factual claims raised in the affidavits submitted by the parties, and no conclusions sufficient to support the issuance of the preliminary injunction below had been or could be reached by the trial judge.

Jacobson's answering brief deals only superficially with these legal issues, focusing, to the extent it does, solely upon

the question of whether a hearing was necessary. This attempt to brush the legal issues under the table is, we submit, unavailing.

1. Mandatory injunctions are to be granted only in exceptional cases.

Jacobson's answer to the point that the stringent rule governing the issuance of mandatory preliminary injunctions should have been applied is limited to the following comment in its brief (at 16 n.8):

> Preliminary injunctions directing manufacturers to continue selling products to distributors are frequently issued, and such injunctions have been upheld by this Court. See, e.g., *Interphoto Corp.* v. *Minolta Corp.*, 417 F.2d 621 (2d Cir. 1969); *Semmes Motors, Inc.* v. *Ford Motor Co.* [429 F.2d 1197 (2d Cir. 1970)]. The form of the injunction in the case at bar was agreed to by the defendant and the fact that it is phrased in mandatory, rather than in prohibitory, terms is completely insignificant.

These assertions are simply unsupportable.*

The fact that the injunction is mandatory in nature is not "insignificant." The settled rule in this Circuit and others which have spoken on the point is that such an injunction will not issue except where the movant clearly is entitled to relief on the merits and has shown that extreme irreparable damage will result if the injunction is denied. *Clune* v. *Publishers' Association, supra; Exhibitors Poster*

* Plaintiff's suggestion that Armstrong cannot complain because it agreed to the form of the injunction is, of course, frivolous. Judge Weinfeld's opinion granting the injunction instructed the parties to consent to the form of an order (A 554).

Exchange, Inc. v. *National Screen Service Corp.*, 441 F.2d 560 (5th Cir. 1971); *Dorfman* v. *Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969); *Joseph Bancroft & Sons Co.* v. *Shelley Knitting Mills, Inc.*, 268 F.2d 569, 574 (3d Cir. 1959); *O'Malley* v. *Chrysler Corp.*, 160 F.2d 35, 36 (7th Cir. 1947). While the trial judge specifically recognized that he was granting a mandatory injunction (A 553), he disregarded the legal standard applicable in such circumstances.*

Furthermore, Jacobson's insinuation that mandatory injunctions are frequently issued in distributor cases (Pl. Brief 16 n.8), citing *Interphoto* and *Semmes Motors*, is not well taken. *Interphoto* did not involve a mandatory injunction at all. There, plaintiff sued prior to the proposed termination and received an injunction restraining the threatened cancellation. Similarly *Semmes Motors* is not in point. While that case did involve a mandatory order, the termination of plaintiff's distributorship, coming as it did in the midst of two actions brought by Semmes for injunctive relief concerning the conduct of that distributorship, falls within the rule that a mandatory preliminary injunction may lie to restore a *status quo* altered during the pendency of litigation for equitable relief. *Jones* v. *SEC*, 298 U.S. 1, 15-18 (1936); *Texas & New Orleans Rail-*

* Moreover, the reasons the trial judge gave for granting this extraordinary relief—"the absence of any real harm to the defendant and the need to restore the status quo . . ." (A 553)—not only turned the rule governing such injunctions in this Circuit on its head (*see* Def. Brief 12-14) but also have been specifically disapproved as grounds for the issuance of preliminary injunctions in ordinary cases in which the less stringent standards apply. *Humble Oil & Refining Co.* v. *Harang*, 262 F.Supp. 39, 44 (E.D. La. 1966); *Christ* v. *Vending Enterprises Corp.*, 191 F.Supp. 485, 488 (E.D.N.Y. 1961); *Parks* v. *Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975).

road Co. v. *Northside Belt Railway Co.*, 276 U.S. 475, 479 (1928); *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F.2d 725, 726-727 (3d Cir. 1962).*

In short, the appropriate legal test in a case such as this is stringent, and, we believe, plaintiff has simply failed to clear the hurdle.

2. *The failure to find any probability of success is fatal.*

In an effort to twist the argument Jacobson charges that Armstrong is asking "this Court to replace the *Sonesta* rule with an entirely new standard requiring the plaintiff to establish at an evidentiary hearing that it is certain to prevail on the merits in order to obtain a preliminary injunction." (Pl. Brief 15). Nothing could be further from the truth.

What Armstrong has urged and, we submit, demonstrated (Def. Brief 17-20) is that a showing of "probable success on the merits" is explicitly required under the first branch of the *Sonesta* test; under the second branch, which derives from *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953), a showing of no less than "some likelihood of success" is necessary. *Hoh* v. *Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974). Here the District Court was unable to conclude that Jacobson had made any showing whatsoever of a likelihood of success on the merits. Thus, the answer to Jacobson's present contention is not

* In addition, in *Semmes* this Court emphasized that the termination of Semmes' Ford franchise meant that " 'his business [would be] obliterated . . .' ". 429 F.2d at 1205. This showing, which comes well within the "extreme or very serious damage" requirement of *Clune*, is something Jacobson has never claimed.

that Armstrong demands too much, but that the District Court accepted too little. As this Court has recently repeated, to secure a preliminary injunction a movant should make "a clear showing that there is a likelihood of success . . ." on the merits at trial. *Schneider* v. *Whaley*, Dkt. No. 76-7306 (2d Cir., August 20, 1976), slip op. at 5243. The District Court's opinion reflects that no such showing was made here.*

3. A hearing was necessary to support an injunction.

Jacobson disputes that the District Court erred in issuing a preliminary injunction without an evidentiary hearing where the only significant factual issue—the reason for Jacobson's termination as an Armstrong contractor—was sharply controverted. Relying on *Semmes Motors, Inc.* v. *Ford Motor Co., supra,* and *SEC* v. *Frank*, 388 F.2d 486, 493 n. 6 (2d Cir. 1968), Jacobson argues that Armstrong did

* No extended discussion is warranted of the deficiencies in Jacobson's argument (Pl. Brief 24-26) that it has shown irreparable injury. First, Jacobson's insistence that a preliminary injunction was warranted by what the trial judge supposed might be the difficulty of "precise calculation" of damages (A 551-552) is disposed of by *Triebwasser & Katz* v. *American Telephone & Telegraph Co.*, 535 F.2d 1356 (2d Cir. 1976). Second, Jacobson's attempt to bring itself within the holdings of *Interphoto Corp.* v. *Minolta Corp., supra,* and *Bergen Drug Co.* v. *Parke, Davis & Co., supra,* is completely undercut by its continuing, but hardly surprising, inability to cite to a single piece of evidence before the District Court which demonstrates the kind of impact on any aspect of its business which was crucial to the results in those cases. (*See* Def. Brief 35-36). Indeed, those cases would be, at most, relevant only to sales by Jacobson's Supply Center. Given Jacobson's contention that "over 90%" of its business "involves construction work obtained through competitive bidding" rather than its Supply Center activities (Pl. Brief 26), the impact of the loss of the Armstrong line to Jacobson's business would be miniscule, even if *Interphoto* and *Bergen Drug* otherwise applied.

not request an evidentiary hearing, and so it cannot complain of the issuance of a preliminary injunction on affidavits (Pl. Brief 14-16).

The major flaw in Jacobson's argument is that in determining the propriety of a preliminary injunction, the issue is not whether a hearing was requested, but rather whether it was necessary. If a factual resolution is required for determination of a vital issue, then a hearing must be held. As Judge Kaufman commented in *Dopp* v. *Franklin National Bank*, 461 F.2d 873, 879 (2d Cir. 1972), "even where a party can be deemed to have waived his right to a hearing, the movant is not relieved of his obligation of establishing a reliable factual basis for the preliminary injunction" and "an evidentiary hearing [is] essential to resolve the credibility gap."*

The charitable construction Judge Weinfeld accorded Jacobson's affidavits established, at most, when read together with those submitted for Armstrong, that the reason for Jacobson's termination is, as the lower court put it, "in sharp dispute" and "on the instant record remains a matter of substantial doubt" (A 548-550). Given this record, *Dopp* makes clear that Jacobson had the burden of securing a favorable resolution of the factual disputes at an evidentiary hearing if a preliminary injunction were properly to issue. Armstrong, being neither plaintiff nor movant and having at the very least met Jacobson's affidavits with its own, can hardly be held to have had a duty to demand a hearing to prove Jacobson's surmises false.

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* Interestingly, *Dopp*, which is frequently cited in Armstrong's brief, is studiously ignored in Jacobson's.

It is no answer to argue, as Jacobson does, that Judge Weinfeld "had before him not only the pleadings and affidavits, but also the transcripts of three depositions and a large number of exhibits" (Pl. Brief 15), because even with this material the District Judge was frank to note that he could not conclude, even on a preliminary basis and in terms of probabilities, which party had the facts on its side. Nor is it meaningful for plaintiff to argue that "[i]t is simply not the function of a hearing on a preliminary injunction motion to make a final determination of the merits of the underlying dispute" (Pl. Brief 16); no one has ever claimed otherwise. The point remains that an evidentiary hearing on a preliminary injunction motion is essential where, as here, the facts are in issue and the lower court believes the written record leads to no conclusion. That, we submit, is the teaching of *SEC* v. *Frank, supra,* and of *Dopp.* The failure to follow that course was error which requires reversal of the order below.

B. The essential element of a "contract, combination or conspiracy" is missing.

Plaintiff attempts to rebut Armstrong's point that Jacobson has not shown the joint action required to state a Sherman Act Section 1 claim by contending that (Pl. Brief 21) "[t]he Sherman Act . . . is violated, not only where there is a conspiracy with a third party, but where the arrangement or combination is put together by coercive tactics of the manufacturer alone." However that may be, the plain fact is that the principle bears no relevance to the facts of this case and fails to meet Armstrong's argument.

Section 1, by its terms, requires a concert of action between two or more parties, and no court has ever held otherwise. *See, e.g., House of Materials, Inc.* v. *Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962). In some instances the courts have ruled that a contract or combination may be established through the coercive tactics of the manufacturer (a) where the plaintiff-retailer (or distributor) has acquiesced as a result of the coercion, thereby forming an agreement between plaintiff and defendant (*e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 142 (1968); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 150 n.6 (1968)); or (b) where there was an overall scheme among defendant and its distributors (*e.g., United States* v. *General Motors Corp.*, 384 U.S. 127 (1966)). Yet, in this case there is no claim under either of these theories; in fact, the record clearly refutes both.

Plaintiff stated in its motion papers below time and again that it never acquiesced in any restriction it alleges Armstrong tried to place upon it (*e.g.*, A 30, 467, 468-69). Thus, Jacobson cannot and does not rely upon an illegal agreement between the parties. *E.g., Quinn* v. *Mobil Co.*, 375 F.2d 273 (1st Cir.), *petition for cert. dismissed*, 389 U.S. 801 (1967).* Likewise, plaintiff has made no showing of any overall illegal scheme involving Armstrong and its dis-

* *Quinn* v. *Mobil Oil Co., supra*, though relied upon by plaintiff, is of no help to it, and indeed, supports Armstrong's position in this regard. There, as here, plaintiff never acquiesced in the restrictions it claimed its supplier sought to impose upon it, and no overall scheme among the supplier and its distributors was shown. The court concluded there was "at best . . . a unilateral attempt to coerce plaintiff into making . . . an agreement", 375 F.2d at 275, which it held was not a "contract, combination or conspiracy" within Section 1 of the Sherman Act, and thus affirmed the dismissal of the complaint for failure to state a claim under the antitrust laws.

tributors whereby any Armstrong contractor has been restricted in any way.*

Stymied under the tests established by the case law, plaintiff sought to rely in its motion papers solely on an alleged conspiracy between Armstrong and a single contractor, Berger. Plaintiff claims the conspiracy resulted from an alleged complaint by Berger concerning plaintiff (Plaintiff's Supplementary Memorandum 4; A 464-65). Apart from the fact that there is no support for this claim in the record (*see* Def. Brief 25-26), the law is quite clear that a complaint from a distributor followed by a refusal to deal by the manufacturer is not, without more, sufficient joint action for a Section 1 violation. *Westinghouse Electric Corp.* v. *CX Processing Laboratories, Inc.*, 523 F.2d 668, 675 (9th Cir. 1975); *Interphoto Corp.* v. *Minolta Corp.*, 295 F.Supp. 711, 719 n. 3 (S.D.N.Y.), *aff'd*, 417 F.2d 621 (2d Cir. 1969); *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.*, 289 F.Supp. 584 (S.D.N.Y. 1968). *See also Beverage Distributors, Inc.* v. *Olympia Brewing Co.*, 440 F.2d 21 (9th Cir.), *cert. denied*, 403 U.S. 906 (1971).**

In short, where, as here, there is no evidence of joint action, it is clear that neither serious nor substantial ques-

* The only evidence in the record as to resale practices of other Armstrong contractors is defendant's exhibit showing a list of contractors that recently have sold outside their appointed area of primary responsibility (A 326).

** Surprisingly, plaintiff's brief (at 20-21) fails to distinguish any of these cases. It merely quotes dictum out of context from *United States* v. *Uniroyal, Inc.*, 300 F.Supp. 84 (S.D.N.Y. 1969). In that case the court went on to require, as a prerequisite to finding an unlawful refusal to deal, a showing that affirmative coercive efforts of the manufacturer secured the compliance of its distributors with the manufacturer's suggested retail prices, thus constituting an improper agreement. 300 F.Supp. at 90.

tions as to any antitrust impropriety have been raised, and accordingly, the lower court order granting Jacobson a temporary injunction should, we submit, be reversed.

Conclusion

For the foregoing reasons and the reasons set forth in Armstrong's initial brief, the order of the District Court should be reversed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THOMAS DESOYE, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 20th day of September 1976, I served the annexed BRIEF upon the attorney named below by duly mailing a true copy thereof to him at his address, as follows:

David N. Ellenhorn, Esq.
Moses & Singer
51 West 51st Street
New York, N.Y. 10019

Thomas DeSoye

Sworn to before me this
20th day of September, 1976.

Notary Public

THOMAS J. CERNA
Notary Public, State of New York
No. 60-0807760
Qualified in Westchester County
Certificate Filed in New York County
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